No. 94-264

FILED
SEP 21 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VERGNAUD AIMABLE, *et al.*,
Petitioners,

v.

LONG & SCOTT FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Courts of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

TIMOTHY B. DYK
(*Counsel of Record*)
DANIEL D. McMILLAN
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

GREGORY S. SCHELL
ROBERT A. WILLIAMS
FLORIDA RURAL LEGAL
SERVICES, INC.
406 S.E. Avenue E
Suite 102
Belle Glade, Florida 33430
(407) 996-5266

Counsel for Petitioners

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
ARGUMENT 1
CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

Bartels v. Birmingham, 332 U.S. 126 (1947) 4

Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317 (5th Cir. 1985) 5

Boire v. Greyhound Corp., 376 U.S. 473 (1964) 3, 6

Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983) 4

Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988) 4

Charles v. Burton, No. 92-150-VAL (WDO), 1994 U.S. Dist. LEXIS 10017 (M.D. Ga. July 1, 1994) 2

Castillo v. Givens, 704 F.2d 181 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983) 5

Falk v. Brennan, 414 U.S. 190 (1973) 2, 3

Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973) 3, 5, 6

Howard v. Malcolm, 852 F.2d 101 (4th Cir. 1988) 3

Martin v. Selker Brothers, Inc., 949 F.2d 1286 (3d Cir. 1991) 5

Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979) 3, 4, 5, 6

Ricketts v. Vann, No. 93-2447, 1994 U.S. App. LEXIS 20700 (4th Cir. Aug. 5, 1994) 4

Rutherford Food Corporation. v. McComb, 331 U.S. 722 (1947) 2, 3, 5

TABLE OF AUTHORITIES (Cont'd.)

Page

Tobin v. Anthony-Williams Mfg. Co., 196 F.2d 547 (8th Cir. 1952) 5

Usery v. Pilgrim Equipment Company, Inc., 527 F.2d 1308 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976) 4

Wirtz v. Lonestar Steel Co., 405 F.2d 668 (5th Cir. 1968) 3

Statutes

Fair Labor Standards Act, 29 U.S.C. §§ 201-219 1

Migrant and Seasonal Agricultural Worker Protection Act § 1801-1872 1

Legislative History

H.R. Rep. No. 885, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 4547 . . . . . 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-264

VERGNAUD AIMABLE, *et al.*,

Petitioners,

v.

LONG & SCOTT FARMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

---

1. Respondent does not dispute that the issue of joint employment is an important and recurring question under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Workers Protection Act (AWPA), as shown in the petition (at 25-28) and the brief of Amici Curiae United Farm Workers of America, AFL-CIO, *et al.*, filed in support of the petition (hereinafter "Amici"). Nor does Respondent dispute that agricultural employers frequently seek to avoid obligations under the FLSA and the AWPA by employing crew leaders as the nominal employers of the farmworkers working in their fields. (*See* Pet. at 26; Amici at 9-13.) There is no significant dispute as to the underlying facts, and the decision of the Eleventh Circuit sets forth a clear and well-defined rule for joint employment (albeit a rule that conflicts with prior decisions of this Court and other circuits). This Court has not decided a significant joint

employment case under the FLSA for more than forty years (since its decision in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)) and, so far as we are aware, has not decided any joint employment case for more then twenty years (since its decision in *Falk v. Brennan*, 414 U.S. 190 (1973)). The Court has yet to decide any case defining employment under the AWPA since its enactment in 1983. As shown in the amici curiae brief, this case presents issues of enormous significance to millions of American farmworkers.[1] (*See* Amici at 4-6.) Reversal of the Eleventh Circuit's decision would not "automatically make all farmers a joint employer" (Opp. at 25), but would require that the lower federal courts use the proper standard rather than the restrictive standard adopted by the court below.

2. Respondent primarily opposes certiorari on the ground that, in its view, the Eleventh Circuit decision is correct and on the mistaken theory that there is no conflict between the decision below and decisions of this Court or other Courts of Appeals. As shown in the petition, the decision below is not sustainable because it conflicts with decisions of this Court and with clear language and legislative history approving the decisions on which petitioners rely. More significantly for present purposes, there is a direct conflict between the legal standards adopted in *Aimable* and those applied by this Court and other Courts of Appeal.

3. As shown in the petition, the *Aimable* decision conflicts with prior decisions of this Court and other circuits holding that a single unified test of employment applies in single and joint employer cases. (Pet. at 12-16.) Those conflicting decisions apply the same analysis whether the workers claim that they are employees, rather than independent contractors, or whether they

---

[1] The importance of granting this Petition is underscored by the fact that district courts are already relying upon *Aimable* to disregard otherwise relevant factors supporting a finding of joint employment and dismissing the claims of migrant farmworkers. *See, e.g., Charles v. Burton*, No. 92-150-VAL(WDO), 1994 U.S. Dist. LEXIS 10017 (M.D. Ga. July 1, 1994).

assert that they are jointly employed. The Eleventh Circuit has created a fundamentally different test for analyzing joint employment and in that respect, its approach conflicts with this Court's decision in *Rutherford* (which respondent wholly ignores)[2] and the other cases cited in the petition (at 12-16) which expressly hold that the same test applies. For example, in *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973), the Fifth Circuit relied upon *Wirtz v. Lonestar Steel Co.*, 405 F.2d 668, 669 (5th Cir. 1968), which held that the same test and factors that apply in a single employer case apply in a joint employer case. This point is either lost on respondent or it has simply chosen to ignore it. In all events, the resulting conflict merits resolution by this Court.

4. Respondent admits that in adopting a different test for joint employment the Eleventh Circuit has dismissed as legally irrelevant four factors that frequently support a finding of joint employment -- namely, investment in equipment and facilities, opportunity for profit and loss, permanency and exclusivity of employment, and the degree of skill required to perform the job. (Opp. at 4.) Indeed, the Eleventh Circuit, in its own words, held that these four factors "are of no value to joint employment determinations." (App. 18a.)

As discussed in the petition (at 22-23), numerous cases dealing with joint employment relationships have held that the four factors rejected by the Eleventh Circuit are relevant to the joint employment determination. *See, e.g., Rutherford*; *Howard v. Malcom*, 852 F.2d 101, 104-05 (4th Cir. 1988); *Real v. Driscoll*

---

[2] Nowhere in either of two other decisions of this Court discussing joint employment is there any suggestion that different tests apply depending upon whether the case is a joint employer or single employer case. *See Falk*, 414 U.S. at 195; *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

Strawberry Assocs., Inc., 603 F.2d 748, 756 (9th Cir. 1979).[3] Since the filing of the petition, the Fourth Circuit has, again, expressly adopted an approach applying the very factors deemed legally irrelevant in *Aimable*, thus reaffirming the existence of a conflict. *Ricketts v. Vann*, No. 93-2447, 1994 U.S. App. LEXIS 20700 at *6 (4th Cir. Aug. 5, 1994). Similarly, since factors to be considered in single employer cases are the same as those considered in joint employer cases, *Aimable* further conflicts with single employer cases decided by this Court and virtually *every* circuit court of appeals which apply the four factors deemed legally irrelevant by *Aimable*. *See, e.g., Bartels v. Birmingham*, 532 U.S. 126, 130 (1947) (applying each of the four factors rejected by *Aimable*); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311-15 (5th Cir.) (same), *cert. denied*, 429 U.S. 826 (1976); *Brock v. Superior Care*, 840 F.2d 1054, 1058-59 (2d Cir.

---

[3] Respondent vainly attempts to explain away the conflict between the *Aimable* decision and *Real* 603 F.2d at 756, a case in which the Ninth Circuit, as part of its joint employer analysis, applied each of the four factors rejected by the *Aimable* court. First, respondent (at 9) notes that "[n]o crew leader was involved" in *Real*. Of course, it is of no legal significance that *Real* concerned whether a grower and a distributor of strawberry plants -- rather than a grower and a crew leader -- were joint employers. Second, respondent quotes from the *Real* decision to suggest that it held that the four factors are only useful to distinguish employers from independent contractors (Opp. at 9) when, later in the opinion, the Ninth Circuit also applied those factors for purposes of its joint employment analysis. *Real*, 603 F.2d at 756. Third, respondent misconstrues two other Ninth Circuit cases as rejecting the four factors. (Opp. at 4, 5-6, 9.) In both cases the court, while finding no joint employment, recognized the relevance of multiple factors. Indeed, in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), the Ninth Circuit indicated that the factors enumerated by the court were simply among the relevant factors, emphasized that the totality of the circumstances must be considered, and cited *Real* thereby confirming the relevance to joint employment analysis of each of the four factors rejected in *Aimable*.

1988) (same); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293-96 (3d Cir. 1991) (same).

Respondent's opposition (at 5-6) implicitly suggests that *Rutherford* and the other conflicting decisions discussed in the petition (at 21-23) have somehow been repealed by the AWPA regulations which specifically list only five factors relied on by the Eleventh Circuit. But, as shown in the petition (at 15-16, 22), those regulations recognize that other factors are relevant and the legislative history of the AWPA specifically approves the conflicting decisions upon which petitioners rely. H.R. Rep. No. 885 at 7, 97th Cong., 2d Sess., *reprinted printed in* 1982 U.S.C.C.A.N. 4547, 4553.

5. The petition (at 24-25) explains how *Aimable* conflicts with prior decisions of this Court and other circuits by assigning "little relative weight" to two other factors -- ownership of the property or facilities where the work occurred and performance of a specialty job integral to the business -- factors indisputably supporting a finding of joint employment. *See, e.g., Rutherford Food Corp.*, 331 U.S. at 730; *Griffin & Brand of McAllen, Inc.*, 471 F.2d at 237-38; *Real* 603 F.2d at 755. Respondent simply ignores this conflict.

6. Finally, respondent fails to refute the existence of a conflict between (1) *Aimable* and its insistence on "direct" control and supervision, and (2) decisions of this Court and other courts of appeal that require only "indirect" control and supervision.

As explained in the petition (at 16-20), the *Aimable* court improperly focuses on "direct" control and "continuous" supervision. The cases cited in the petition demonstrate that such an approach conflicts with the approach of this Court (Pet. at 18) and other circuits. *See, e.g., Castillo v. Givens*, 704 F.2d 181, 189 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5th Cir. 1985); *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547, 549-

50 (8th Cir. 1952); *Real*, 603 F.2d at 756.[4] Respondent (Opp. at 15-23) attempts to justify *Aimable*'s requirement of "direct" and "continuous" supervision by arguing that Respondent's direct supervision was as a factual matter "de minimis." But, even if that were true (which it is not),[5] that is simply beside the point; indirect control and supervision are enough, particularly where unskilled piece work is involved. (Pet. at 20.)[6] Thus, the approach of the *Aimable* court conflicts with the approach of other courts of appeals.

7. Resolution of the conflict on these important issues is critical to proper enforcement of the FLSA and the AWPA in the context of American agriculture. The decision below presents the best vehicle for resolution of this pervasive conflict. Certiorari should be granted.

---

[4] Although Long & Scott exert much effort to distinguish factually *Castillo* and *Beliz* (Opp. at 10), Long & Scott misses the point -- these cases hold that certain critical facts are legally relevant to the control and supervision factors and, therefore, conflict with *Aimable* which dismisses such facts as legally irrelevant.

[5] While Long & Scott admits that Frank Scott supervised the grading work of the farmworkers, it asserts that Scott did not express concerns about "particular individuals" (Opp. at 19); however, Long & Scott overlooks Miller's Affidavit in which he admits the "Mr. Scott or a farm manager may tell me or my supervisor that a *particular worker* is not doing a good job." (RSF2: Miller Aff. ¶ 31 (emphasis added).)

[6] Long & Scott also ascribes much significance to Miller's putative status as an independent contractor while disregarding the authorities cited in the petition (at 28) which uniformly hold that this status does not insulate a grower from liability as a joint employer. *See, e.g., Boire*, 376 U.S. at 481; *Real*, 603 F.2d at 755-56; *Griffin & Brand of McAllen, Inc.*, 471 F.2d at 235; H.R. Rep. No. 885 at 7, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 4553.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY B. DYK
(Counsel of Record)
DANIEL D. McMILLAN
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

GREGORY S. SCHELL
ROBERT A. WILLIAMS
FLORIDA RURAL LEGAL
SERVICES, INC.
406 S.E. Avenue E
Suite 102
Belle Glade, Florida 33430
(407) 996-5266

Counsel for Petitioners

September 21, 1994